In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 529

UNITED STATES, PETITIONER

v.

CARLO BIANCHI AND COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO BRIEF IN OPPOSITION

We confine this reply to respondent's suggestion that the government's petition for a writ of certiorari is out of time.

Respondent argues that the petition, which presents an issue that goes to the liability of the United States, should have been filed twenty-one months ago when the court below rendered its judgment on liability. The contention is that the Court of Claims' decision of January 14, 1959 (Pet. App. 15–51) was a "final judgment" under its Rule 38(c) and that the subsequent judgment of May 9, 1962, assessing damages, "did not affect the reviewable finality" of the prior judgment (Brief in Opp., 11).

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To be sure, the government might have sought review of the 1959 judgment without awaiting the determination of damages. *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155. It did not do so because the considerations justifying the grant of certiorari were then no different than when the Court denied the government's petition in *United States* v. *Fehlhaber Corp.*, 355 U.S. 877; the conflict in decisions now asserted arose thereafter. In other cases, different reasons might counsel against seeking immediate review of the preliminary judgment as to liability, e.g., a belief that proof of damages might fail altogether or that the quantum of damages might prove negligible. But, whatever the reason for postponing a challenge of the initial judgment, the result is not to foreclose that challenge.

The reason the 1959 judgment was itself reviewable was not that it was a "final judgment," but because this Court may review by certiorari both interlocutory and final decisions of the Court of Claims. The rule is illustrated by *Marconi Wireless Co.* v. *United States*, 320 U.S. 1. There, on cross-petitions by the claimant and the United States (defendant against a claim of patent infringement) both parties sought review after the final judgment of the Court of Claims assessing damages, and this Court reviewed issues of validity and infringement determined by a much earlier judgment. In its opinion, the Court made clear that review might have been sought earlier, but that matters determined by the preliminary judgment were not, for this reason, foreclosed on later

review. *Id.*, at 47. This flexibility is emphasized by the wording of the present jurisdictional statute governing review of cases in the Court of Claims. The provision, 28 U.S.C. 1255, carefully avoids limiting review to "final judgments or decrees." Contrast 28 U.S.C. 1257, governing review of state court decisions.

The judgment of January 14, 1959, deciding liability only, was plainly interlocutory. It is comparable to the initial judgment in *Catlin* v. *United States*, 324 U.S. 229, a condemnation case in which the district court upheld the power of the United States to take certain property and adjudged title to have been acquired by the government in advance of its determination of the amount of compensation due the condemnee. As this Court declared (p. 233) in sustaining the action of the court of appeals in dismissing the condemnee's appeal for lack of finality of the judgment, a final decision is one which "leaves nothing for the court to do but execute the judgment."[2] See, also, *Bruce* v. *Tobin*, 245 U.S. 18; *California National Bank* v. *Stateler*, 171 U.S. 447; *Martinez* v. *International Banking Corp.*, 220 U.S. 214; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U.S. 251, 255–

[1] In recent years, Congress has also provided a measure of flexibility in connection with court of appeals' review of district court judgments. See the so-called Interlocutory Appeals Act, 1958, 28 U.S.C. 1292(b).

[2] In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, the Court did treat the judgment as final in a situation where "[e]very prayer for relief was passed upon" but the district court reserved the matter of formulating "a plan for carrying into effect the court's order of divestiture" (p. 308). However, the determination in that case that the judgment was "final" rests in large part upon this Court's assessment of the "purposes for which the Expediting Act was passed" (p. 311).

256; *Mississippi Central R. Co. v. Smith*, 295 U.S. 718. The lower court's characterization of its judgment is not conclusive. See *Cotton v. Hawaii*, 211 U.S. 162, 170–171; *Department of Banking v. Pink*, 317 U.S. 264, 268; *Cole v. Violette*, 319 U.S. 581, 582; *Richfield Oil Corporation v. State Board*, 329 U.S. 69, 72. It follows that the government was free to await the final judgment of May 9, 1962, to seek review, and that its petition, filed within ninety days after rehearing of that judgment was denied, is timely. 28 U.S.C. 2101(c).

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1962

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